Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer Protection	)	WC Docket No. 05-271
in the Broadband Era	)	
	)	

COMMENTS OF PAC-WEST TELECOMM, INC.

Pac-West Telecomm, Inc. ("Pac-West"), by its undersigned counsel and pursuant to sections 1.415 and 1.419 of the Federal Communication Commission's ("Commission" or "FCC") rules, 47 C.F.R. §§1.415 & 1.419, respectfully submit these comments in response to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") released on September 23, 2005 in the above-captioned proceeding.[1] In the *NPRM*, the Commission seeks comment on whether, and to what extent, it should utilize its Title I ancillary jurisdiction to impose consumer protection requirements on broadband Internet access service providers that the Commission exempted from Title II common carrier regulation in a *Report and Order* released at the same time as the *NPRM*. The Commission's determination to rely on Title I rather than Title II to exercise oversight over broadband transmission services used to provide Internet access service was erroneous because, among other reasons, the Commission does not have the authority to remove longstanding common carrier status simply by declaration. In addition, Title II provides the best framework for addressing ILEC control of last mile broadband as well as narrow-

[1] *Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, WC Docket No. 05-271, FCC 05-150, released September. 23, 2005.

band connections to end users. Although the Commission has not explained the scope of its authority under Title I, it is less desirable and practical to reimpose pursuant to Title I obligations which could have been more readily applied, maintained, and defended under Title II. Pac-West nevertheless urges the Commission to establish protections in this proceeding to ensure that incumbent local exchange carriers ("ILECs") do not harm consumers by discriminating against competitors in provision of access to ILEC-controlled last mile Internet access broadband or dial-up connections to end users or to ILEC-controlled Internet Protocol ("IP") broadband backbone facilities.

A. IP-Enabled Interconnection Obligations Should Be Established

ILECs, in controlling significant IP backbone facilities, have the clear ability to undermine competitive providers in the market for IP-enabled services by imposing higher costs on critical inputs, and by refusing to provide, or discriminating in the provision of, access to the IP broadband backbone. Even before the recent mergers of AT&T/SBC and Verizon/MCI, there was a critical need for the Commission to assure that ILECs could not adversely affect competition in the IP broadband market by discrimination in the rates, terms and conditions of the broadband services and facilities they offer. Indeed, prior to the recent mergers, even the ILECs' merger partners acknowledged that consolidation in the IP broadband backbone networks would hamper competition.[2]

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[2] In opposing the MCI and Sprint merger several years ago, SBC stated:

> The size of a backbone is critical because a backbone's value to its users lies in its ability to provide connectivity to the entire Internet. . . . [W]here one backbone achieves a substantial size advantage over its rivals, it necessarily "reduces the value of, and therefore the demand for, the rivals' products." At some point, "the market

The "interconnection" of IP broadband networks is currently implemented outside the traditional telephony regulatory framework via "peer-to-peer" relationships. But the ILECs' control over last mile connections, significant and growing participation in the provision of IP-backbone services, and the frequent necessity of using ILECs as transit carriers, increases the ability of ILECs to harm competitors in the provision of IP-enabled services. Although the conditions imposed by the Commission as part of its approvals of the SBC/AT&T and Verizon/MCI mergers require the merged companies to maintain for three years the same number of settlement-free peering arrangements as on the date of the merger, and to post their peering policies for an additional two years, these conditions, as well as being temporary, do not proscribe discrimination in provision of settlement-free

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> may 'tip,' with customers abandoning the rivals altogether because their networks are too small to be viable."

Petition of AT&T Corp. to Deny Application, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at ¶9 (Feb. 18, 2000).

Likewise, AT&T stated that:

> IBPs [Internet Backbone Providers] with unbalanced traffic, then, are expected to become customers rather than be peers. They can do so by entering into a "transit arrangement" pursuant to which, for a fee, an Internet Backbone Provider [] agrees to transport the traffic to terminating points on its network or on the networks of other IBPs with whom it has a private peering relationship. Alternatively, a large IBP might agree to a "paid-for" private peering relationship allowing traffic to be terminated on its network, but the IBP paying for such an interconnection cannot represent to its customer that it has a private peering relationship. This significantly hampers its ability to compete with those that do have settlements-free private peering relationships.

Opposition of SBC Communications Inc., CC Docket No. 99-333 at 41 (Feb. 18, 2000).

peering or other IP interconnection.[3]

For instance, ILECs can discriminate against CLECs and other competitive providers by peering with each other at no charge while at the same time demanding peering fees from CLECs and other competitive providers. ILECs are also in a position to raise fees for network interconnection.

Additionally, ILECs are likely to engage in various forms of non-price discrimination, such as providing other competitors problematic or otherwise inferior circuits, and providing priority routing to themselves. Electronic data exchange traverses a series of points where data is converted from one medium, format, language, or technology to another. Each of these control points in the IP network provides the ILECs with an opportunity to discriminate. For example, at each switch or router, control over the end user's data could be exercised via firewalls, IP port forwarding, rate limiting, packet inspection and restriction, or forced caching. ATM cells flowing across any ATM network could be subject to a wide variety of controls for anticompetitive purposes. The following diagram provides a high level view of how customers served by wireless, DSL, or cable modem service connect to the IP backbone and the various control points that could be used by the ILECs to engage in non-price discrimination.

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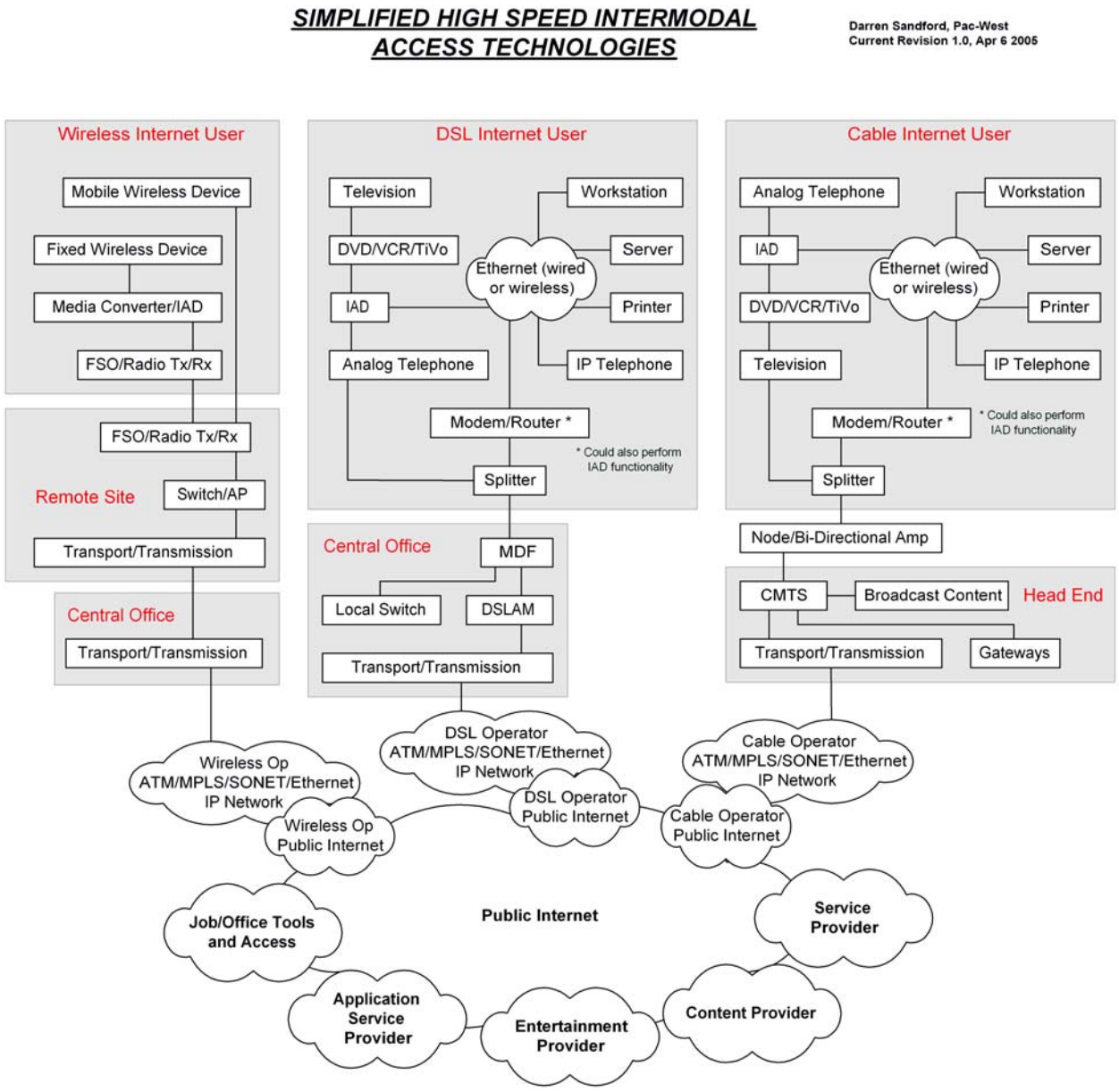
[3] *SBC Communications, Inc. and AT&T Corp. Application for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, FCC 05-183, released November 17, 2005; *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-75, FCC 05-184, released November 17, 2005.



B. "Net Neutrality" Protections Should Be Established

The likelihood of anticompetitive behavior by the ILECs that could harm consumers is very real. Barely had the ink dried on the *Report and Order* than ILECs began proposing ways to exploit the absence of Title II assurances of reasonable rates and nondiscrimination. ILECs are discussing various plans that would effectively require

competitors to pay for priority routing that their own IP services presumably would not be left without.[4] Furthermore, it is no secret that ILECs are very capable of engaging in port blocking.[5] While Pac-West is not opposed in all cases to tiered pricing proposals, it is very problematic to permit ILECs to offer tiered pricing without adequate safeguards to protect against discrimination against competitors.

In fact, ILEC proposals reveal that there is insufficient competition in provision of broadband connections to end users. ILECs are developing and implementing plans to engage in the classic strategy of monopolists and duopolists of increasing revenues by restricting output, in this case in the form of lower speeds. If the last mile broadband market were genuinely competitive, ILECs and cable operators would be competing to provide the fastest speeds, not proposing to artificially restrict output to maximize prices.

While the Commission's *Net Neutrality Policy Statement* is helpful, it is not enforceable.[6] The Commission should go further in this proceeding and determine that ILECs' current proposals to discriminate against third party providers in terms of quality of access to consumers violates the Commission's net neutrality principles. The Commission must adopt enforceable safeguards.

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[4] *See Phone Companies Set Off a Battle Over Internet Fees: Content Providers May Face Charges for Fast Access; Billing the Consumer Twice?*, The Wall Street Journal, A1 (Jan. 6, 2006); *see also Executives Want to Charge for Web Speed: Some Say Small Firms Could be Shut Out of Market by Championed by BellSouth Officer*, Washington Post, D05 (Dec. 1, 2005).

[5] *See, e.g.*, Consent Decree, *In re Madison River Communications, LLC*, DA 05-543 (2005). Madison River, and ILEC, was blocking ports used for VoIP applications, thereby affecting customers' ability to use VoIP.

[6] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, CC Docket No. 02-33, FCC 05-151, released September 23, 2005 ("*Net Neutrality Statement*").

C. Proposed Safeguards

In light of these risks of anticompetitive conduct, Pac-West urges the Commission to establish the following safeguards in this proceeding:

(1) Require ILECs to allow any IP network to peer with their networks if the competitive network interconnects at a specified number of peering points;

(2) Require ILECs to provision interconnection to the IP backbone and transit service to non-peering ISPs and CLECs at LRIC rates;

(3) Implement binding net neutrality requirements to preclude ILECs from blocking or providing inferior quality access to non-ILEC IP-enabled services; and

(4) Prohibit ILECs from imposing any restrictions or limitations on use of Session Initiation Protocol ("SIP"), a signaling protocol used for establishing sessions in an IP network that could be a useful tool for discrimination by the ILECs.

Respectfully submitted,

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Richard M. Rindler
Patrick J. Donovan
Wendy M. Creeden
SWIDLER BERLIN LLP
3000 K Street, N.W.
Suite 300
Washington, DC 20007-5116
202-424-7500 Phone
202-424-7645 Fax

rmrindler@swidlaw.com
pjdonovan@swidlaw.com
wmcreeden@swidlaw.com

Counsel for Pac-West Telecomm, Inc.

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